Office-Supreme Court, U.S.
FILED
MAR 23 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 810

M. ELI LIVINGSTONE,
Petitioner,

vs.

FATIMA CHARITIES, INC. and
MICHAEL P. GRACE, II,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

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FATIMA CHARITIES, INC. and MICHAEL P. GRACE, II,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

M. Eli Livingstone, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, which affirmed a judgment of the United States District Court for the District of Massachusetts in favor of the respondent Grace for $25,962.59 and in favor of respondent Fatima Charities, Inc. for $43,273.90 against the petitioner (A. App. 183a)*.

* We thus refer to the only papers printed below, which are contained in the Record Appendix to the brief filed on the part of the petitioner herein in the Court of Appeals. Petitioner's exhibits are referred to as DE and respondents' exhibits are referred to as PE.

Opinions Below

The opinion of the Court of Appeals (A. App. 183a), is reported in 297 F. 2d 836. Judge Wyzanski's opinion (A. App. 172a) is reported in 195 F. Supp. 933.

Statement as to Jurisdiction

The judgment of the Court of Appeals was rendered on January 24, 1962, and was entered in the Office of the Clerk of said Court on the same day (A. App. 183a). On February 12, 1962, within the time prescribed by the Rules of said Court, petitioner duly filed a petition for rehearing which was denied by the Court on February 16, 1962 (A. App. 184a). On February 23, 1962, the Court of Appeals stayed its mandate pending determination of petitioner's application for writ of certiorari (A. App. 184a). The jurisdiction of this Court is invoked under 28 U.S.C.A., §1254(1).

Questions Presented for Review

1. Whether the holder of an option to sell securities to his optionor must, in an action to recover the price of said securities, prove that he had legal title to the securities at the time of his attempted exercise of the option.

2. Whether the holder of an option to sell securities, who, in consideration of a loan of money made to him by his optionor, lends the securities to the optionor under an agreement which authorizes the optionor to sell the securities and gives the optionee the right to demand delivery of of identical securities on repayment of the loan prior to the expiration of the option period, may, in an action on the option agreement to recover the price of the securities, recover such price without proving either (a) that he had legal title to and tendered the securities to the optionor within the option period, or (b) that he became entitled to such securities prior to his attempted exercise of the option by tender to the optionor of the full indebtedness owing to the latter.

Statement of the Case

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the United States District Court for the District of Massachusetts, which was the court of first instance, was the diversity of citizenship of the parties. Petitioner is a citizen of the Commonwealth of Massachusetts; respondent Grace is a citizen of the State of New York; respondent Fatima Charities, Inc. is a corporation incorporated under the laws of the State of New Jersey; and the matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

Nature of the Action

The nature of the action was described as follows by the respondents' counsel at the opening of the trial in the district court (A. App. 29a):

> "Mr. Rooney: If your Honor please, this is essentially a contract action in which it is claimed that the defendant sold certain securities to the plaintiff and gave an option to the plaintiff to resell them to the defendant. The plaintiff properly exercised the option, in accordance with its terms, and the defendant refused to purchase or pay for the securities. This is a suit for the purchase price."

Facts of the Case

On October 27, 1954 the petitioner sold to the respondent Grace 1,050M Appalachian Electric Power Company 3⅛% bonds of 1977 at 110½% of face value, with accrued interest from June 1, 1954, the total price, inclusive of accrued interest, amounting to $1,174,012.98 (PE 2, A. App. 150a). Simultaneously, the petitioner gave said respondent an irrevocable option in writing to resell saids bonds to

petitioner on or before December 8, 1954 at 108½% of face value, with accrued interest (PE 4, A. App. 152a). Respondent Grace paid for the bonds as follows: He paid $118,762.98 out of his own funds, and $1,055,250.00 with monies borrowed from the Guaranty Trust Company of New York, on interest at the rate of 3% per annum (A. App. 5a, 45a-46a). To secure repayment of said loan to the Guaranty Trust Company, said respondent pledged to said bank the bonds which he had purchased from the petitioner (A. App. 5a), and the petitioner deposited cash margin with said bank, which by December 8, 1954, amounted to $99,800.00 (A. App. 72a).

Grace failed to exercise his option to resell the bonds to the petitioner within the time limited by the option agreement (A. App. 78a). And although the market price of the bonds had, during that period, fallen to a level below the option price (A. App. 72a; 100a; 111a-114a), the petitioner agreed to revive and extend the option to July 1, 1955, when he and Grace arrived at the following agreement during December, 1954: (1) That petitioner would pay to the Guaranty Trust Company Grace's indebtedness of $1,055,250.00, with accrued interest of $2,811.70, amounting in all to $1,058,061.70, which payment would operate to release the bonds and the petitioner's cash margin from the bank's lien (A. App. 72a). (2) In exchange for the payment so made by the petitioner to the Guaranty Trust Company Grace would (a) obligate himself to repay said sum of $1,058,061.70 to petitioner, with interest thereon at the rate of 3% per annum, on or before July 1, 1955 (A. App. 46a; 119a-122a; 124a); (b) would lend the bonds to the petitioner with authority to sell same and apply the proceeds to petitioner's own use (A. App. 80a-81a); and (c) would have the right to call on petitioner for 1,050M Appalachian Electric Power Company 3⅛% bonds of 1977 at any time on or prior to July 1, 1955 on payment to the

petitioner of the aforementioned sum of $1,058,061.70, with interest thereon at the rate of 3% per annum, from the date of the petitioner's payment of said sum to the Guaranty Trust Company to the date of repayment thereof by Grace to the petitioner (A. App. 119a-124a).

Pursuant to the aforementioned agreement, the parties performed the following acts: (1) Petitioner extended the option to July 1, 1955 by means of two documents, one being a letter, bearing date December 8, 1954, in which he stated that he was thereby extending the option to July 1, 1955 (PE 7, A. App. 156a), and the other being a letter, dated back to October 27, 1954, in which he granted respondent Grace an irrevocable option to sell him $1,050,000 Appalachian Electric Power Co. 3⅛% bonds of 1977 at 108½% at any time or times through July 1, 1955 (PE 3, A. App. 154a)*. (2) Petitioner paid the Guaranty Trust Company $1,058,061.70 (A. App. 45a). (3) Grace agreed to repay the $1,058,061.70 to the petitioner, with interest thereon at the rate of 3% per annum, on or before July 1, 1955 (A. App. 46a; 174a), and executed PE 8, which recited that he did "hereby loan (petitioner) $1,050,000.00 Appalachian Electric Power, 3⅛% of 1977, on call; in return for your payment of my obligation to Guaranty Trust Company" (A. App. 156a).

Thereafter, on or about June 28, 1955, Grace assigned his right, title and interest in and to $500,000.00 principal amount of Appalachian Electric Power Company 3⅛% bonds of 1977 to respondent Fatima Charities, Inc., and in and to $250,000.00 principal amount of the same bonds to

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* The concluding paragraph of PE 3 reads as follows: "It is intended that the above identified bonds shall be used in exercising this option, and the option, if exercised, shall be exercised through the sale by you or your assigns to me of the above identified bonds."

Cistercian Monastery, "together with (his) right to exercise an irrevocable option granted (him) by said Livingstone & Company to sell said bonds to said Livingstone & Company at any time or times through July 1, 1955, at 108½" (PE 11-A; A. App. 160a).

On June 28, 1955 respondent Fatima Charities, Inc. mailed the petitioner a copy of Grace's assignment to it, together with a letter stating that "we herewith exercise the option referred to in your letter of October 27, 1954, to Mr. Grace, and hereby require you to purchase $500,000.00 principal amount Appalachian Electric Power Company 3⅛% bonds due 1977, out of the total amount of $1,050,000.00 principal amount of such bonds loaned to you on call by Mr. Grace, at 108½" (PE 11, A. App. 159a). On the same day Grace wrote petitioner a letter in which he advised petitioner of the aforementioned assignments, and concluded with the following sentence: "As to the remaining $300,000.00 principal amount of such bonds, I hereby exercise the said right contained in your said letter of October 27, 1954, and hereby require you to purchase $300,000.00 principal amount of such bonds at 108½" (PE 12, A. App. 161a).

Although the option agreement sued on provided that "the option, if exercised, shall be exercised through the sale by you or your assigns to me of the above identified bonds" (PE 3, A. App. 151a), neither of the respondents tendered or offered to deliver any bonds to the petitioner. Nor did either of them offer to pay or credit the petitioner with any part of Grace's indebtedness to the petitioner.

The petitioner, therefore, replied to respondents' aforementioned demands by a letter in which he offered, if the respondents would consent thereto, to do the following: (1) To credit each of the respondents with a sum equal to 108½% of the face amount of the number of bonds to which he or it made claim, together with an amount equal to the coupon interest that would have accrued on said

bonds at the rate of 3⅛% per annum since June 1, 1955, less the amount of federal stamp tax, i.e, 5¢ per $100 of face value of bonds purportedly sold by each of the respondents to the petitioner; (2) to deduct from the aforementioned sum (a) such proportion of Grace's indebtedness to the petitioner as would be equal to the ratio between the face amount of the bonds claimed by each respondent and the face amount of 1,050 bonds, which constituted the total number of bonds on which the petitioner had given the option to Grace and his assigns; (b) such proportion of the interest at 3% per annum that had accrued on Grace's indebtedness to the petitioner as would be equal to the same ratio; and (3) to pay the difference between (1) and (2) to each of the respondents (PE 13, A. App. 162a).

The respondents, however, never replied to petitioner's aforementioned letter*. And more than five years later they brought this action. They have been allowed a recovery on the option agreement notwithstanding that they failed to show either (a) that they had legal title to and tendered the securities to the petitioner, or (b) that they were relieved of the necessity of owning and tendering the securities because, by a timely tender to the petitioner of the monies owed him, they occupied a position which, in law, would be deemed equivalent to that of owners who had tendered the securities.

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* In view of Grace's testimony that he had never agreed to pay petitioner any interest on the $1,058,061.70 which petitioner paid to the Guaranty Trust Company (A. App. 91a)—testimony which the trial court found to be untrue (A. App. 174a)—it is a fair inference that respondents did not reply to petitioner's letter because of their unwillingness to recognize petitioner's claim to said interest.

Reasons for Allowance of Writ

As the sequel will show, the Court of Appeals has decided an important state question in a way in conflict with applicable Massachusetts law*.

The specific question in the case at bar which the Courts below were called upon to decide was this: Whether the customer of a securities dealer, who has been given an option by the dealer to sell the dealer certain securities at a named price within a limited period, and who, in exchange for a loan of money to him by the dealer lends the dealer the securities with authority to sell them and to apply the proceeds to the latter's use, upon the understanding that the customer may call for the securities at any time prior to the expiration of the option period upon payment of his indebtedness to the dealer, may, in an action on the option agreement to recover the price of the securities, recover such price without proving either (a) that he had legal title to and tendered the securities to the dealer within the option period, or (b) that he became entitled to such securities prior to his attempted exercise of the option by offer or tender of payment to the dealer of the full indebtedness owing to the latter.

In our economy such a question is of importance. The number, variety and dollar volume of the purchases and sales of securities that are made daily in this country, particularly in such leading financial centers as New York City and Boston, are tremendous. Most of these transactions are negotiated by purchasers and sellers through the intervention of brokers and dealers. A decision which, like that affirmed by the Court below, undertakes to define, in

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* The district court held that the law of Massachusetts governs validity of, interpretation of and rights and damages under the option contract (A. App. 175a). Both petitioner and respondents acquiesced in this holding in the Court below.

universal terms, the rights and obligations that customer and broker or dealer sustain toward each other, must, in a state which contains one of the nation's leading financial centers, affect so large a number of persons and transactions as to make the question passed upon a question of state importance which, if decided in conflict with applicable state law, requires review by this Court.

As often as not, the customer and broker or dealer are citizens of different states (Loss, Securities Regulation [1951 ed.], 56). When the rights and obligations of such parties are governed by state law, it is imperative that cases between them in the federal courts be decided in accordance with the applicable state law. For, to wink at a departure from state law, is to encourage, in an important sector of the economy, a revival of the "grave discrimination by noncitizens against citizens" (*Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 74), which this Court sought to end when, in the *Erie* case, it disapproved the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court.

The law of Massachusetts as declared by its highest Court is that a party who has been given an option to buy or sell property must, in order to recover on the option agreement, prove, at the very least, that "he was within the term ready, willing and able to carry out his part of the transaction" (*Hunt* v. *Bassett*, 269 Mass. 298, 302). Now, what the respondents were required to do by way of carrying out their part of the transaction under the option agreement was to *sell* the petitioner bonds. Hence, under the holding of *Hunt* v. *Bassett*, *supra*, it was a precondition to their right of recovery that they prove that at the time they demanded that petitioner purchase bonds from them, they were ready, willing and able to *sell* him bonds. And

to establish their ability to do so, Massachusetts law required them to prove that they had a vested interest in the bonds at the time that they demanded the petitioner purchase the bonds from them. For, as was said in *Coolidge* v. *Old Colony Trust Co.*, 259 Mass. 515, 521:

> "It is an elementary principle of the common law as to sales that one cannot transfer title to property in which he has no title or interest. '*To be able to sell property, he must have a vested interest in it at the time of the sale.*' *Low* v. *Pew*, 108 Mass. 347; *Taylor* v. *Barton Child Co.*, 228 Mass. 126." (Emphasis supplied.)

The fact, however, is that at the time the respondents demanded of the petitioner that he purchase the bonds from them, they had no interest whatever in the bonds. The district court found that when respondent Grace loaned the bonds to the petitioner in December, 1954, he authorized the petitioner to use them in his own interest (A. App. 178a). Pursuant to that authorization, the petitioner, before the end of the year 1954, "applied the bonds to fulfill commitments under short sales that he himself had made" (A. App. 49a-50a). The effect of that application was "that the bonds left (petitioner's) possession and went into the hands of buyers from (him)" (A. App. 49a). As a consequence, both the petitioner and the respondents were divested of all interest in the bonds. For, as was said in *Commonwealth* v. *Althause*, 207 Mass. 32; 42*:

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* *Compare with Provost* v. *United States*, 269 U. S. 443, 452, 455, which holds that when the borrower of securities applies same to a short sale, neither borrower nor lender retains any interest in the securities, and all that remains when the short sale is completed is the obligation of the borrower to return the securities borrowed on repayment to him of his cash deposit, and the obligation of the lender to repay the deposit with interest as agreed.

. . . . It is doubtless competent for a pledgor and pledgee to agree that securities pledged for the payment of a note (in which the pledgor has the general property and the pledgee a special property or lien for payment of the debt due him from the pledgor) may be sold by the pledgee and the proceeds used by him (the pledgee) as if he alone has been the owner of the securities, leaving to the pledgor (in whom was the general property in those securities) nothing but the unsecured personal obligation of the pledgee to account to him for the value of the securities at the date of the payment of the note. *Such an agreement, if made, is not an incident to a pledge of securities. It is an agreement authorizing the pledgee to end the pledge and all the rights of the pledgor in the securities pledged.*" (Emphasis supplied.)

The law of Massachusetts is inflexible in its requirement that to sustain a recovery on an option agreement, in the absence of waiver of performance by the optionor, "strict compliance with its conditions must be shown" (*Hunt* v. *Bassett*, *supra*, 269 Mass. at p. 302). Thus, in *Boynton* v. *Woodbury*, 101 Mass. 346, where the plaintiff, being in actual physical possession of twenty shares of stock which the defendant had sold him under an agreement to purchase them back at plaintiff's election, and to return to the plaintiff the $1,000.00 he had paid for the stock, together with interest thereon at the rate of 6% per annum, the Court said at page 349:

> "If the contract between these parties is to be taken simply and literally as an undertaking on one side to sell, and on the other to buy, certain shares in a corporation, at a price and within a limit as to time previously agreed upon, some of the objections relied upon by the defendant would be of great force and weight.

> To claim the benefit of an executory contract of that kind, and to be entitled to claim damages for a violation of it, the party intending to sell must allege and prove that, at the time appointed, he was ready and able to fulfil the contract on his part, and that he made a distinct tender of performance and literally offered to make the conveyance, but that the party who had agreed to buy refused to receive the stock or to fulfil his part of the agreement. The stipulations would be mutual and dependent, and neither party could complain of the other without an explicit and full tender of performance on his own part."*

The respondents neither pleaded nor proved waiver by the petitioner of any of the terms or conditions of the option agreement. It would, therefore, seem clear that, having failed to show that they were ready, willing and able to sell the bonds to the petitioner at the time they demanded he purchase them from them, the respondents could not, under applicable Massachusetts law, recover on the option agreement. The district judge, however, thought that the prior loan of the bonds by Grace to the petitioner had somehow absolved the respondents from proving their

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* If in the *Boynton* case, *supra*, the Court sustained a recovery in plaintiff's favor, despite the fact that he did not tender to the defendant the shares previously transferred to him by defendant, it was because it construed the contract before it to be one in which the plaintiff was given, not an option to sell shares to defendant, but an option to decide "whether he should hold the stock as a purchaser, or whether the transaction should be a loan of one thousand dollars". Having so construed the contract, the Court held that when the plaintiff elected to treat the transaction as a loan, he stood in the position of a creditor holding the shares as security for the payment of his debt, and that as such, he was not required to tender or surrender the shares to the defendant until the debt was paid. This, of course, is hornbook law. On a similar state of facts, the same result was arrived at in *Williams* v. *Patrick*, 177 Mass. 160.

readiness, willingness and ability to perform the conditions of the option agreement on their part to be performed. Thus, without citing a single case to support him, did he write as follows (A. App. 178a):

> "In short, a customer has made a valid tender to a dealer when he has transferred the securities in question to the broker, whether outright, by way of pledge, or by way of pledge, or by way of loan. In each situation, when the customer calls upon the dealer for performance, the dealer is authorized forthwith to apply to the customer's order the securities theretofore transferred to him."

The foregoing appears to be in direct conflict with the holding of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Althause*, *supra*, 207 Mass. 32, 42, as well as with the holding of this Court in *Provost v. United States*, *supra*, 269 U. S. 443, 452, 455. For, as these latter cases make clear, there were no securities in existence at the time of the respondents' demand upon the petitioner against which their so-called "order" could be applied.

The district judge absolved the respondents not only from the need to prove their readiness, willingness and ability to perform their part of the option agreement. He also absolved them from all obligations to tender the petitioner repayment of his loan to Grace with the accrued interest thereon. Thus, did he say (A. App. 177a):

> "No tender would be required because the bonds had been transferred in advance to Livingstone. Nor would it be requisite to offer to pay principal or interest to Livingstone on account of the loan he had made on these bonds. Cf. *Donovan v. Draper*, 268 Mass. 555, 560. Without additional specific authorization, he had the right to satisfy the debt for principal and interest, and the lien to secure them, by deducting the appro-

priate amount from the proceeds. *Ibid.* The amounts of deduction had been fixed by the contract. The formula was mathematical and certain. Immediate action was imperative, first so that the customer would not run the risk of a fluctuating market, and second so that interest on the loan would not accumulate."

Our answer to the foregoing, elaborated below, is two-fold: (1) *Donovan* v. *Draper, supra*, does not support the thesis of the district judge. (2) The fact that the petitioner might have had the right, without authorization from the respondents, to deduct the amount of Grace's indebtedness, with interest, from the option price of the bonds, did not oblige him to do so.

(1) *Donovan* v. *Draper, supra*, 268 Mass. 555, was an action in which the plaintiff sued his stockbrokers for damages for breach of their contract with him to buy and sell stock on his request. The only questions passed upon in that case were the following: (a) Whether the plaintiff had adequately apprised the defendants of the termination of his contract with them; and (b) whether, if he had done so, the defendants were liable to him for the decline in the value of his stock between the date when he terminated the contract and they should have closed his account, and the later date when they actually did close his account. The nature and scope of the holding in *Donovan* v. *Draper* are fully revealed in the following excerpt from the opinion in that case (268 Mass. at p. 560):

"In view of the facts found by the auditor, it is apparent that the plaintiff had been dissatisfied with his dealings with the defendants for some time before June 24, 1926; and when, on that date, his attorney wrote the defendants demanding the amount which it was claimed was due the plaintiff, the defendants knew or should have known that their contract with the

plaintiff was terminated, and they should then have closed the account. Their failure to do so entitles the plaintiff to recover under count 3 the cash balance that would have been due him if the account had been closed on June 25. The defendants, if they had performed the duty which they owed the plaintiff could have saved the loss incurred by keeping the account open until it was finally closed in August, and at a time when the credit balance existing in June had been lost with the exception of $87.82."

All that *Donovan* v. *Draper, supra,* stands for was explained as follows in *Krinsky* v. *Whitney,* 315 Mass. 661, 667:

> "A stockbroker who has undertaken employment by a customer to carry his margin account and to execute his orders to buy and sell securities as long as a proper margin is maintained by the customer ordinarily owes a duty to the customer to close the account when so directed by the customer, and failure or neglect of the broker to comply with such direction would make him liable for damages to the customer. *Stone* v. *Lothrop,* 109 Mass. 63. *Donovan* v. *Draper,* 268 Mass. 555."

The Court, in *Donovan* v. *Draper, supra,* did not undertake to state the theory which underlay its decision. That theory, as expressed in MEYER, THE LAW OF STOCKBROKERS AND STOCK EXCHANGES, p. 359, is as follows:

> "The relation of customer and broker in marginal transactions ordinarily is not assumed for any specified period, and accordingly, subject to certain limitations mentioned in the next section, is terminable at the will of either party. The relation, as we have seen, is a double one, first that of principal and agent, and second that of debtor and creditor or pledgor and

pledgee. An agency, where not entered into for a fixed term, may be ended at the will of either principal or agent. * * *

"Accordingly, the customer has a right to terminate at will his entire marginal account or any commitment which his broker is carrying for him. This is true whether he desires to close out long commitments by the sale of securities which are held for him on margin, or short commitments by the purchase of securities which have previously been sold short."

When properly understood, it is clear that the decision of *Donovan* v. *Draper, supra*, has no bearing whatever on the case at bar. For all that it holds is that a broker-agent must carry out the order of his customer-principal to close out his account whenever the order is given. The relationships between the parties at bar, numerous though they were, did not include that of customer and broker, or principal and agent. The petitioner dealt with Grace as a dealer in securities. He and Grace stood toward each other solely as principals in each of their several relationships. Thus, in Grace's purchase of bonds from the petitioner, the petitioner was vendor and Grace was vendee. Then, under the terms of the option agreement Grace and his assigns became potential vendors and the petitioner a potential vendee. Finally, under the loan agreement, Grace was creditor and the petitioner debtor in respect to the bonds which Grace loaned the petitioner, and the petitioner was creditor and Grace debtor in respect to the money which the petitioner loaned Grace.

The relationships between the parties to this action, and their corresponding rights and duties, were *toto coelo* different from those in *Donovan* v. *Draper, supra*. This is made clear by *Coolidge* v. *Old Colony Trust Co., supra*, 259 Mass. 515, where the facts were as follows: The plaintiff

bought from one Burroughs, who, like the petitioner at bar, was a dealer in securities, certain shares for which he paid Burroughs the agreed price. Burroughs bought the shares with the money which the plaintiff had given him, and took title to the shares in his own name. He then pledged them with the defendant banks, from whom the plaintiff sought to recover the shares on the theory that, having been purchased with plaintiff's money, they were his property. In denying recovery to the plaintiff the Court said (259 Mass. at p. 522):

> "When the plaintiff paid his money to Burroughs that money became the property of the latter. The relation between the two was that of creditor and debtor. When Burroughs bought and took delivery of the shares, title passed to him. There was no relation of principal and agent. * * * Cases like *Furber* v. *Dane*, 204 Mass. 412, and *Gifford* v. *Eastman*, 251 Mass. 520, where the relation of customer and broker existed, do not govern the relation of buyer and seller or creditor and debtor, which was that subsisting between the plaintiff and Burroughs."

(2) As to the suggestion of the Court below that, without specific authorization from the respondents, the petitioner might have deducted the amount of Grace's indebtedness, with interest, from the option price of the bonds, we have the following to say:

To say that the petitioner might have, without authorization from the respondents, deducted the amount of Grace's indebtedness, with interest, from the option price of the bonds, is to say only that the petitioner, had he chosen to, might have resorted to self-help. Put another way, it is to say that the petitioner had the right to waive conditions precedent which the respondents, by the option agreement, were required to perform. That may have been his right. But it was not his duty.

CONCLUSION

The Court below has decided an important state question in a way in conflict with applicable state law. The reasons stated above, as well as the Court's responsibility to prevent grave discrimination by noncitizens against citizens, require that this petition for writ of certiorari be granted.
that this petition for writ of *certiorari* be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5879.

M. ELI LIVINGSTONE,

Defendant-Appellant,

v.

FATIMA CHARITIES, INC., *et al.*,

Plaintiffs-Appellees.

Judgment

JANUARY 24, 1962.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Roger A. Stinchfield
ROGER A. STINCHFIELD
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5879.

M. ELI LIVINGSTONE,

Defendant-Appellant,

v.

EATIMA CHARITIES, INC., *et al.*,

Plaintiffs-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Harry Sacher, with whom *Samuel Livingstone* was on brief, for appellant.

Joseph P. Rooney, with whom *Ansel B. Chaplin, George Broomfield, Dinsmore Adams, Gaston, Snow, Motley & Holt* and *Turk, Marsh, Ouchterlony & Kelly* were on brief, for appellee.

Opinion of the Court

JANUARY 24, 1962.

PER CURIAM. Upon a consideration of the entire record and the briefs submitted by the parties, we believe that the result reached by the district court should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 810.

M. ELI LIVINGSTONE,
PETITIONER,

v.

FATIMA CHARITIES, INC., and
MICHAEL P. GRACE, II,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Blanchard Printing Company, Boston, Mass. — Law Printers

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Opinions Below

The opinions below are correctly cited on page 2 of the petition.

Jurisdiction

The jurisdiction of this Court is founded as stated on pages 2 and 3 of the petition.

Questions Presented

The respondents disagree with the Statement of Questions Presented in the petition. They say that the questions are:

1. Whether the court below has decided an important question in a way in conflict with applicable state law;
2. Whether the decision below was correct.

Statutes Involved

There are no statutes involved.

Statement of the Case

The respondents are in substantial agreement with the petitioner's statement of the facts as set forth in pages 3 to 7 of the petition. However they wish to point out certain errors and omissions.

1. In reciting the circumstances surrounding the extension of the option and the payment of respondent Grace's loan at the Guaranty Trust Company, the petitioner neglects to include a recital that on such payment the petitioner took possession of the bonds, not only as borrower, but as pledgee, as security for Grace's obligation to pay to the petitioner the amount paid to the Guaranty Trust Company. The petitioner so admitted in his answer (A. App. 10a - 11a) and the trial judge so found (A. App. 174a). Furthermore, in replying to the respondents' letters notifying petitioner of the exercise of the option, (P. E. 11 and 13, A. App. 159a, 161a) the petitioner requested authority

> "to purchase these securities and to satisfy the existing lien" (P.E. 13, A. App. 162a);

and the letters forwarded by the petitioner with said reply for signature and return by the respondents (P.E. 13-A, 13-B, A. App. 165a) (which were not signed or returned) contained the words "after reimbursing yourselves for your lien".

The respondents believe this fact to be without significance on the actual merits of the controversy, but point it out because the extraordinarily formalistic argument of the petitioner herein seems to be entirely based on the premise that when the respondents attempted to exercise the option they had the status only of lenders of the bonds with no property interest therein (Petition pp. 10-13). The trial judge said, and the respondents agree, that all that was significant was the fact that prior to the exercise of the option the respondents had transferred the bonds to petitioner (A. App. 178a). Whether the transfer was outright, or by way of pledge or loan, was not significant.

2. In a footnote at p. 5 of the petition, the petitioner calls attention to the language of the option (P.E. 3, A. App. 151a) reciting that

> "It is intended that the above identified bonds shall be used in exercising this option".

The petitioner fails to point out that the "identification" was merely a recital of amount and series of the bonds. No Bond numbers were given.

Again the respondents believe the fact to be without real significance on the merits of the controversy but of interest only in the light of the petitioner's argument.

3. The respondents disagree with the paraphrase of the petitioner's reply to the respondents' letters exercising the

option (Petition pp. 6, 7). As a matter of hindsight the petitioner would undoubtedly have written in accordance with his counsel's paraphrase in the petition. However the letter (P.E. 13, A. App. 162a, 163a) and the enclosures (P.E. 13A, 13B, A. App. 164a, 165a) conveyed an entirely different message. In the first place the petition fails to point out that the letter referred to enclosed unconditional confirmations of purchase at the option price (P.E. 15a, 15b, 15c, A. App. 166a). Furthermore the letter said

> "In each case there is enclosed a letter for signature authorizing us to purchase these securities and to satisfy the existing lien" (P.E. 13, A. App. 162a).

Authority to purchase in this setting could only mean authority to the petitioner to purchase more bonds in the market for the respondents' account. More bonds were not needed. The respondents were trying to *sell* the bonds of which they were lenders and pledgors, not to obtain more. Turning to the enclosures referred to in the forwarding letter, they make the situation more confusing, and more remote from the paraphrase. They state

> "Please liquidate for my account"

with a recital of the appropriate amount of bonds involved (P.E. 13A, 13B, A. App. 164a, 165a). This could only mean authorization to sell for the account of the respondents in the open market bonds which the respondents would then have to purchase to cover the sale. As pointed out above the respondents were trying to close out the account in accordance with their rights granted in the "put", and not to become involved in further transactions.

4. The respondents disagree with the footnote at page 7 of the petition. Therein the petitioner states that

> "it is a fair inference that respondents did not reply to petitioner's letter because of their 'unwillingness to recognize petitioner's claim to said interest'".

The difficulty with this suggestion is that the trial judge specifically refused to draw such inference (A. App. 179a), and correctly ruled that the only evidence on the point was that the respondent Grace made the claim that interest was not agreed on some months after June 1955, and that there was no evidence that Grace's view on the subject was communicated to the petitioner until long after the option period expired.

Argument

I.

Rule 19 of the Rules of this Court provides that certiorari will be granted only where there are "special and important reasons therefor". None of the illustrations contained in paragraph 1 (b) of the Rule, which refers to Courts of Appeals, have even a remote bearing on the issues presented by the record in this case excepting that contained in the clause

> "or has decided an important state . . . question in a way in conflict with applicable state . . . law.":

In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) this Court stated that "Special and important reasons" imply a reach to a problem beyond the academic or the episodic". It further stated that the writ should not issue to satisfy a scholarly interest or for the benefit of particular litigants.

Petitioner presents the question involved in quite general terms, asserting it to be of far reaching consequence

to the business community. But when the essential facts of this controversy are looked at, as they must be, the question pales in importance. It struggles hard to reach the level of even the episodic, and is not of academic importance. For the facts present merely a case of a securities transaction between the parties Grace and Livingstone, a disagreement over the terms thereof, and a rearrangement, as to the financing of the transaction. Under this rearrangement, petitioner gave defendant Grace a "put" as to the securities, loaned Grace the money for the payment of a bank loan, and in consideration received the securities involved, which he used to cover his own short sales.

When so viewed, Judge Wyzanski's decision, affirmed *per curiam* by the Court of Appeals for the First Circuit, does not, as contended by the petitioner, define in universal terms the rights and obligation of the myriads of relations among customers and brokers and dealers in the securities marketplace. It applies only to the unusual situation of a securities dealer, a specialist in the type of transaction involved in this case, who also acts as banker in the transaction, and as such, disposes of stock pledged with him in connection with the customer's loan. The questions of the legal effects of these extremely torturous transactions are only of interest to petitioner and those other securities dealers, if any, on the fringes of the securities market, who carry on banking functions connected with the sale of securities, and who are authorized in such banking activities to dispose of the securities pledged in connection with the financing arrangement. The disposition of the securities by petitioner is essential, for then, and only then, may the question presented by this case be raised. If either the purchaser or the dealer still holds the securities, no such question can be raised. The Massachusetts law is clear.

Viewed in this light, the decision seems of importance only to petitioner Livingstone, and can hardly effect a great number of persons or transactions, especially when it is realized that the decision is only applicable to those transactions which have the necessary contacts with Massachusetts under conflict of law principles.

See *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941).

And as so considered, the matter is not worthy of review by this Court.

II.

The narrow question presented by the record in this case was decided in a way which is in conformity with state law. The District Court and the parties have agreed that the applicable state law is that of Massachusetts. The closest case on its facts to the precise facts of the case at bar, which the respondent could find in any common law jurisdiction, was a Massachusetts case. In *Armstrong* v. *Orlick*, 220 Mass. 112 (1915) (not cited in the petition herein) the plaintiff purchased securities from the defendant, a dealer, and was simultaneously given an option to resell to the defendant. He later pledged the securities with the dealer for a loan. Later, he notified the dealer that he was exercising his option to resell and demanded the money balance of the difference between the option price and the amount of the loan. On these facts a trial judge found for the plaintiff for the balance, and the finding was sustained by the Massachusetts Supreme Judicial Court.

Only two of the Massachusetts cases cited in the petition involve options or "puts" at all. They are *Boynton* v. *Woodbury*, 101 Mass. 346 (1869) and *Williams* v. *Patrick*, 177 Mass. 159 (1900). There is nothing in either of them

which precludes or even affects the result reached herein below. They stand for the proposition that when securities are sold, with an option to resell, the buyer, during the "put" period, has the option to treat the original sale as a loan of the purchase price secured by the securities or, if he decides not to exercise the option, as an outright sale. *Williams*, which was later than *Boynton*, points out that, when the buyer decides to exercise the option, he must tender the securities if the contract expressly so provides, although ordinarily a lender can sue without tender of the collateral. *Williams* goes on to point out that, even though the contract expressly requires tender, it can be waived. The respondent contends that any consensual arrangement whereby the buyer parts with the securities either by transfer to the seller, or to a third person with consent of the seller, is a waiver, if tender were required.

The balance of the Massachusetts cases cited do not involve facts even remotely similar to those in the case at bar with the exception of *Donovan* v. *Draper*, 268 Mass. 555 (1929) and *Krinsky* v. *Whitney*, 315 Mass. 661 (1944). They hold that a customer who has a margin account with a dealer can require the dealer to liquidate the securities in the account, and remit the balance, by a communication to the dealer in any form of words, that he desires to close out the account. They fully support, at least on a "compare" basis, the result reached in the courts below.

Finally, an analysis of what the petitioner contends is required by Massachusetts law, makes it seem unlikely as a requirement of any modern system of jurisprudence. He says in effect that in order to exercise the option respondent Grace and his assignees would have had to tender to petitioner the million odd dollars owed by Grace and demand the return of the bonds borrowed. Upon such tender and demand the petitioner, who had sold the bonds, would then purchase in the open market the million odd of bonds loaned

and give them to Grace and his assignees. Then Grace and his assignees would give the bonds back to the petitioner who would then pay over the "put price". Instead, the courts below, have approved an accounting of the conflicting balances which were in definite and fixed amounts, and have ordered the payment of the balance in favor of respondent Grace and his assignees. This would seem to be not only good law but good sense.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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